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No. 93-240

In The

Supreme Court of the United States

October Term, 1993

TFL, INC. and CENTRAL TRANSPORT, INC., jointly and severally,

Petitioners,

vs.

JOHN WALHOUT, Trustee of Tucker Freight Lines, Inc.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should deny certiorari in a breach of contract case where the Bankruptcy Court, the District Court and the Court of Appeals have each twice reviewed it and where there is no clear showing that the Court of Appeals has departed from the accepted and normal course of judicial proceedings.

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INTRODUCTION

There are several reasons why this Court should deny the Petition. First, there is no clear showing that the Court of Appeals has departed from the accepted and normal course of judicial proceedings or sanctioned such a departure by a lower court to call for an exercise of this Court's power of supervision. Second, there is no showing that the Court of Appeals failed to apply the Indiana law, applicable to the case, in the manner that the highest court of Indiana would have applied it. The Court of Appeals, and the Courts below, have interpreted the contract to require the exercise of Petitioners' option within a "reasonable" time. The determination as to what period of time was a "reasonable" time and as to whether Petitioners exercised their option within that reasonable time are factual issues decided below in Respondent's favor. There is no claim that these findings of fact are clearly erroneous. This Court should not be called upon to decide the facts in this case. Third, the case of *Haney v. Estate of Denny*, 193 N.E.2d 648 (Ind. App. 1963) relied on by Petitioners is not applicable.

The Bankruptcy Court's judgment in this case has been twice reviewed by the District Court and twice reviewed by the Court of Appeals. After such exhaustive review, there is no compelling reason for further appellate review or supervision in this matter.

COUNTERSTATEMENT OF THE CASE

A. Facts

On September 14, 1983, Petitioner Central Transport, Inc. ("Central") acquired all of the shares of Tucker

Freight Lines, Inc. ("Tucker"). The next day, Tucker filed a Voluntary Petition under Chapter 11 of the Bankruptcy Code. Central installed its people as officers of Tucker to operate the company as debtor in possession. In January 1984, a Chapter 11 Trustee was appointed. Ultimately, the Chapter 11 case failed, Tucker ceased operations and the Chapter 11 Trustee began to liquidate Tucker's assets.

On June 5, 1984, Central purchased Tucker's Indiana Intrastate Operating Authority (the "Intrastate Authority") at a public auction sale conducted by agents employed by the Chapter 11 Trustee. Central signed a contract (the "Agreement") to purchase the Intrastate Authority, which in part provided:

> 2(f). If the transfer of the [Intrastate] Authority cannot be completed within eight (8) months from the date of this agreement, the buyer has the option to complete the sale at a later date or require that the [deposit] be returned.

Petitioner Central then caused Petitioner TFL, Inc. ("TFL") to be incorporated in Indiana. Central transferred its rights under the Agreement to TFL. TFL, as required by Indiana law, filed an application with the Indiana Public Service commission ("PSC") seeking approval of the transfer of the Intrastate Authority to it. Objections to the transfer application were filed by four other trucking companies. A hearing date on the transfer application was set for mid-December, 1984. Petitioners then embarked upon a strategy of delaying the PSC hearing on whether or not the Intrastate Authority could be transferred by Tucker's bankruptcy trustee to Central or TFL.

In December 1984, the Petitioners caused an adjournment of the PSC's hearing on approval of the transfer of the Intrastate Authority to a date after February 5, 1985, which was the date the eight month deadline specified in paragraph 2(f) of the Agreement expired. Between December and September 30, 1985, Petitioners continued to implement their strategy of delay, albeit for the purposes of increasing the probability of ultimately completing the sale of the Intrastate Authority at a later date. During this period, Petitioners did not exercise their option to have their deposit returned or otherwise to withdraw from the contract. A hearing on the transfer application was ultimately scheduled before the PSC for October 1, 1985. On September 30, 1985, the day before the PSC hearing, Petitioners – without warning, explanation or reason – withdrew from the Agreement. The PSC proceedings, pursued by Petitioners for more than a year to complete the sale of the Intrastate Authority to them, were dismissed by the PSC a month later at Petitioners' insistence.

Respondent commenced an adversary proceeding in the United States Bankruptcy Court for the Western District of Michigan (the "Bankruptcy Court") seeking, among other things, to recover damages for Petitioners' breach of the Agreement to purchase the Intrastate Authority. After a trial on August 31 and September 1, 1985, the Bankruptcy Court ruled in Respondent's favor and awarded a judgment of $227,500 plus interest and costs. The United States District Court for the Western District of Michigan (the "District Court") affirmed the Bankruptcy Court's judgment. Petitioners then appealed to the United States Court of Appeals for the Sixth Circuit

(the "Sixth Circuit") which, on April 15, 1991, affirmed in part and remanded in part.

B. The Bankruptcy Court's Opinion On Remand From The Sixth Circuit

On remand from the Sixth Circuit, the Bankruptcy Court followed the instructions of the Sixth Circuit (Pet. App. 20a – 21a). The Bankruptcy Court concluded, after applying Indiana law (Pet. App. 26a), that (a) paragraph 5 was not a condition but that (b) paragraph 2(f) of the Agreement conditionally granted the Petitioners an option to either proceed with the transfer application or elect to withdraw from the Agreement, with the condition being triggered and the option right accruing when the transfer of the Intrastate Authority could not be completed within eight months. Because the Agreement did not provide a time for the exercise of the option contained in paragraph 2(f), the Bankruptcy Court concluded, applying Indiana law, that "where there is no provision as to the time of performance, a reasonable time is implied." The Bankruptcy Court then made a factual decision that Petitioners' notice of cancellation of the Agreement almost eight months after the option arose and on the eve of the PSC hearing was not an exercise of their option "within a reasonable time". The Bankruptcy Court also concluded that by not exercising its option to withdraw within a reasonable time, by attempting to withdraw at an unreasonable time, the Petitioners had breached the Agreement. The Bankruptcy Court further concluded that Petitioners' conduct demonstrated a commitment to complete the sale of the Authority at a later

date by attempting to secure PSC approval of the transfer, which amounted to an election to complete the transfer at a later date. On October 25, 1991, the Bankruptcy Court again awarded Respondent a judgment for $227,500 plus interest and costs.

C. The District Court's Decision

Petitioners appealed the Bankruptcy Court's decision to the District Court. On March 24, 1992, the District Court affirmed the Bankruptcy Court.

In their appeal to the District Court, the Petitioners did not raise as an issue on appeal whether the Bankruptcy Court had properly applied Indiana law, but instead raised four other issues. (Pet. App. 6a). The District Court noted that the Bankruptcy Court addressed the questions raised by the Sixth Circuit in response to the Petitioners' prior appeal of the Bankruptcy Court's initial decision. The District Court concluded that the Petitioners were required to exercise their option within a reasonable time and that it was not clearly erroneous for the Bankruptcy Court to hold that Petitioners had failed to exercise their option within a reasonable time. Further, the District Court agreed with the Bankruptcy Court that pursuing one of two inconsistent alternatives constituted an exercise of the option, describing the Bankruptcy Court's decision as "sound." The District Court said "[w]here a party to an option contract elects to perform, the alternative, inconsistent option to terminate is lost." (Citation omitted).

D. The Sixth Circuit's Decision

The Sixth Circuit panel which reviewed this case included two members of the panel who had sat on the Sixth Circuit panel in review of the Petitioners' first appeal to the Sixth Circuit (Chief Judge Merritt and Circuit Judge Ryan).

The Sixth Circuit believed "that the withdrawal provision in Section 2(f) means the buyer had a reasonable period of time after the initial deadline period expired in which to exercise its option to withdraw." (Pet. App. 4a). It concluded that the Petitioners should not have waited for as long as they did to attempt to exercise their option to withdraw because their obligation "was either to exercise [their] option to withdraw within a relatively short period of time after the initial period expired or to pursue diligently the transfer of authority through the Public Service Commission proceeding." Although the Sixth Circuit's opinion does not cite to any authority, it had before it the briefs of the parties and the lower court opinions. Those briefs and opinions cited and relied upon Indiana case law. The Sixth Circuit accordingly affirmed the judgment of the District Court.

SUMMARY OF ARGUMENT

In the exercise of its discretion, this Court should deny the Petition. Despite Petitioners' attempts to argue that the Sixth Circuit has "so far departed from the accepted and normal course of judicial proceedings, or

sanctioned such a departure by a lower court", by claiming that it did not apply Indiana rules of contract interpretation in the manner in which the Indiana Supreme Court would apply them, there is simply no evidence that the Sixth Circuit failed to properly review the matter. The lower courts' opinions clearly applied Indiana law, including decisions regarding contract interpretation rendered by the Indiana Supreme Court.

Petitioners' reliance on *Haney v. Estate of Denny*, 193 N.E.2d 648 (Ind. App. 1963) is misplaced. Although *Haney, supra*, may be good law, it is inapposite to the case at bar because that court dealt with an inchoate option while in the case at bar, Petitioners' option was a choate option; it arose at the expiration of the initial eight month period.

The Bankruptcy Court, the District Court, and the Sixth Circuit have each twice reviewed this matter. There has been a complete and thorough review of the facts and the law. Petitioners simply cannot sustain the heavy burden of demonstrating that the Sixth Circuit has departed from the normal course of judicial proceedings sufficient to demand an exercise of this Court's jurisdiction.

ARGUMENT

Reasons For Denying A Writ Of Certiorari

A. The Sixth Circuit Did Not Depart From The Accepted And Normal Course Of Judicial Proceedings So As To Call For An Exercise Of This Court's Powers

Petitioners argue that the Sixth Circuit failed to properly apply Indiana law and that such failure constitutes a

departure from the accepted and normal course of judicial proceedings to call for an exercise of this Court's power of supervision. (Pet. v). As an even cursory review of the Sixth Circuit, District Court, and Bankruptcy Court opinions shows, the lower courts all applied Indiana law as it was presented to them by the parties. The Sixth Circuit did not disregard any applicable ruling by an Indiana court.

Petitioners cannot seriously challenge the unanimous determinations that the law in Indiana is that the Petitioners had to exercise their option to withdraw within a reasonable time after the option accrued, as set forth in *First Federal Savings Bank v. Key Markets, Inc.*, 559 N.E.2d 600 (Ind. 1990). That is the law applied by the Bankruptcy Court, the District Court and the Sixth Circuit. In fact, the District Court explicitly stated that the parties agreed that this is the law, and Petitioners have not appealed this conclusion of law.

Applying that law, the Bankruptcy Court made a finding of fact that Petitioners had not exercised their option within a reasonable time. "Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Bankruptcy Court to judge the credibility of the witnesses." Bankruptcy Rule 8013. Petitioners do not here contend that there were any erroneous factual findings.

Neither can Petitioners seriously contend that the lower courts did not appropriately apply controlling law from intermediate state courts. For example, the courts below based their decisions in part on *Fraternal Order of Police Lodge No. 52 v. Elkhart*, 551 N.E.2d 469 (Ind. App.

1990) or *Jay Clutter Custom Digging v. English*, 393 N.E.2d 230 (Ind. App. 1979) with regard to defining the standard for determining "reasonable" time. Both the Bankruptcy Court and the District Court explicitly relied on these cases. The Sixth Circuit determined that the lower courts appropriately interpreted the contract to mean that Petitioners had a reasonable – as apposed to open-ended or indefinite – period of time to withdraw, and that Petitioners had waited too long to attempt to withdraw, implicitly endorsing the lower court's application of the law set forth in those two Indiana cases.

B. The Court Of Appeals And The Lower Courts Did Not Misinterpret The Plain Language Of The Agreement

The Agreement provided that the Petitioners could, upon the occurrence of a condition, either withdraw from the Agreement or choose to complete the sale at a later date. Applying Indiana law (see Argument A), the lower courts determined that, because Petitioners did not elect to withdraw from the Agreement within a reasonable time, Petitioners lost that right. Therefore, by default Petitioners elected the other prong of the option – to complete the sale at a later date. Whether the completion of the sale at a later date is described as an option to "continue" to pursue the sale, or "to pursue diligently the transfer", the result remains the same. Foregoing one alternative compelled Petitioners to accept or to exercise the other alternative. The District Court said:

> The two alternatives are inconsistent. Within a reasonable time of February 5, [Petitioners] could either terminate the agreement or proceed

> with the sale. They could not do both. Where a party to an option contract elects to perform, the alternative inconsistent option to terminate is lost. *Corbin On Contracts*, Section 264.

(Pet. App. 11a, 12a). As the District Court said, and as the Court of Appeals affirmed, "by not terminating the contract sooner and continuing to pursue the transfer, [Petitioners] chose the second option", being to complete the transfer at a later date. Petitioners, however, failed to pursue the other prong of the option when, without warning they withdrew from the Agreement and thereafter dismissed the proceedings.

C. *Haney v. Estate of Denny* Does Not Apply And The Court of Appeals Properly Did Not Apply It

Respondent does not quibble with the proposition that *Haney v. Estate of Denny*, 193 N.E.2d 648 (Ind. App. 1963), claimed by Petitioners to be controlling here, is good law. Rather, Respondent points out that the case is simply not applicable to the facts of this case. There, the court found that Haney could not exercise an option because it had not yet ripened. Petitioners claim that they were precluded from exercising their option to complete the sale at a later date because their option had not ripened. Unfortunately for Petitioners, this is simply not true. In the case at bar, the lower courts determined that Petitioners' option "ripened" on February 5, 1985, the expiration of the eight month period set forth in Section 2(f) of the Agreement. Because the option to withdraw was ripe, *Haney v. Estate of Denny, supra*, is inapplicable. Being inapplicable, the Court of Appeals should not have,

and correctly did not, apply it in this case. The courts further determined (and the parties agreed) that Petitioners were required to exercise the option within a "reasonable" period of time after February 5, 1985. Petitioners here do not challenge the conclusions that the option was ripe in February 1985 or that it must be exercised in a reasonable time. Rather, Petitioners indirectly attack the conclusion that an attempted election almost eight months later was not within a reasonable time under the circumstances. Although they attempt to frame the issue as a legal issue, it is a factual issue and this factual finding is not clearly erroneous. Therefore, this Court should deny the Petition.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that this Court deny the Petition For Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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